77-519

No.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

JAMES NEWCOMB,

Petitioner,

VS.

JAMES BRENNAN and HENRY REUSS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on July 11, 1977.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was filed on July 11, 1977 and is set forth in the appendix, pp. App. 1-10. The decision of the United States District Court for the Eastern District of Wisconsin was entered on November 15, 1976 and is set forth in the appendix, pp. App. 11-15.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Under *Elrod* v. *Burns* (1976) 427 U.S. 347 is it a violation of the United States Constitution for a deputy city attorney in a non-partisan office to be fired from his employment because he runs for Congress of the United States?

2. Did the Circuit Court of Appeals err (A) in holding that the petitioner served "at the pleasure" of his employer; (B) in its determination that the petitioner's First Amendment rights were outweighed by the interests of the respondents; and (C) in failing to address the equal protection cause of action pleaded as a second cause of action in the complaint?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. This case involves 42 U.S.C. Sec. 1983, the First Amendment to the Constitution of the United States, and Rules 12 and 56 of the Federal Rules of Civil Procedure and Rule 201 of the Federal Rules of Evidence.

2. The case involves Secs 3.03 and 4.28 of the Charter of the City of Milwaukee, Secs. 2-220.2(2) and 2-3 of the Milwaukee Code of Ordinances, and Sec. 63.29(1), Wis. Stats.

STATEMENT OF THE CASE

Petitioner is an attorney and in the relevant months of April and May, 1976 he was employed by the City of Milwaukee as Deputy City Attorney, a non-partisan political office. In April, 1976 petitioner decided to announce his candidacy for the office of Fifth District Representative to the United States Congress. This decision required that he run against respondent Henry Reuss, the present Representative from the Fifth District, in the primary election of the Democratic party. Prior to any formal announcement of his candidacy, petitioner informed respondent Brennan in early April, 1976 of his intention to run for public office and respondent Brennan initially did not object to these plans. Thereafter, respondent Brennan communicated petitioner's decision to respondent Reuss. The complaint alleges that the respondents then conspired to coerce the petitioner to withdraw his proposed candidacy by threatening to terminate his employment as Deputy City Attorney.

On April 23, 24 and 25 Brennan informed Newcomb that he disapproved of his candidacy. He also told Newcomb that he would be fired if he persisted in his plans to run against respondent Reuss. Nevertheless, Newcomb announced his candidacy on April 26, 1976.

Thereafter respondents Brennan and Reuss conferred and it was agreed that Newcomb would be discharged from his position as Deputy City Attorney by respondent Brennan. During the week following April 26, 1976 respondent Brennan again threatened to fire Newcomb. When Newcomb refused to withdraw from the race respondent Brennan discharged Newcomb from his position as Deputy City Attorney on May 3, 1976. The complaint further al-

leged that the respondents terminated petitioner's employment in order to render him financially incapable of supporting his family and to prevent him from maintaining a political campaign against respondent Reuss.

Finally the complaint alleged a second cause of action claiming the termination was a denial of equal protection.

Upon a motion to dismiss by respondents pursuant to Rule 12, Federal Rules of Civil Procedure, the District Court dismissed the action. On appeal the Circuit Court of Appeals for the Seventh Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I.

THE CASE INVOLVES AN ISSUE OF FIRST IMPRESSION.

In deciding the merits of the case Judge Swygert remarked:

> "... neither Elrod nor Lewis squarely faced the question of whether the policymaker exception should be extended beyond the paradigm situation in which a dismissed employee would, by the nature of his political affiliation, retard the effectuation of a new administration's policies.
>
> We therefore must determine as a matter of first impression whether the state's interest in permitting Brennan to fire plaintiff outweighs plaintiff's First Amendment rights." App. 8.

This statement is made after analysis of the applicable case law particularly *Elrod* v. *Burns* (1976) 429 U.S. 97 and Mr. Justice (then Judge) Stevens' opinion in *Illinois State Union Council 34* v. *Lewis*, 473 F. 2d 561 (7th Cir. 1972). The Court of Appeals clearly ruled that the interests of the plaintiff to enter the primary election for the office of Representative for the Fifth District to the Congress of the United States was a right protected under the penumbra of the First Amendment to the United States Constitution. Further it noted that the United States Supreme Court in *Elrod* had ruled that a certain class of public employees—policy makers—could constitutionally suffer abridgement of First Amendment rights in circumstances where they were members of opposing political

parties and espoused adverse political philosophy. The case at bar does not involve those circumstances—for the plaintiff was not of an adverse political party or philosophy to those who discharged him. His employment was in a non-partisan office. It is respectfully submitted that certiorari should be granted in order to rule on the question of first impression.

II.

THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS.

(A) THE PETITIONER DID NOT SERVE "AT THE PLEASURE" OF HIS EMPLOYER.

Both the Court of Appeals and the United States District Court indulged a particularly fatal incorrect factual assumption. By the apparent vehicle of "judicial notice" it was determined that the petitioner served at the pleasure of the respondent Brennan. This judicial notice short-circuited Rule 56 summary judgment and was violative of Rule 201(e) of the Federal Rules of Evidence providing an opportunity to be heard as to the propriety of the taking of judicial notice. The conclusion made was erroneous. In fact the petitioner did not "serve at the pleasure" of the City Attorney. The applicable provisions of the Milwaukee Charter and Code of Ordinances can be read only to provide that an appointed officer holding the position held by the petitioner, i.e. Deputy City Attorney, can be discharged or dismissed from office only for malfeasance and upon the vote of a majority of the members of the Common Council pursuant to the provisions of Sec. 4.28 of the Milwaukee City Charter and Sec. 2-3 of the Milwaukee Code of Ordinances. Contrary to the determination made by the District Court and affirmed by the Court of

Appeals the respondent Brennan was not at liberty to discharge the petitioner at his pleasure. Since the cause of action was founded under the Civil Rights Act 42 U.S.C. Sec. 1983 this concept should not have been pivotal. However, its introduction by the respondents and acceptance by the court was unfortunately and erroneously critical.

The case is a classic example of how error can be compounded by failure to comply with Rule 56 of the Federal Rules of Civil Procedure. Relevant is Mr. Justice Stevens observation in his dissenting opinion in *Estelle* v. *Gambel,* (1976) 429 U.S. 97.

> "The . . . test is not whether the facts alleged in the complaint would entitle the plaintiff to relief. Rather, it is whether the Court can say with assurance on the basis of the complaint that, beyond any doubt, no set of facts could be proved that would entitle the plaintiff to relief. . . .
>
> Admittedly, it is tempting to eliminate the meritless complaint at the pleading stage. Unfortunately, this 'is another instance of judicial haste which in the long run makes waste,' Dioguardi v. Durning, 139 F.2d 774, 775 (CA 2 1944) (Clark, J.), cited with approval in *Haines* v. *Kerner,* supra, 404 U.S., at 521, 30 L.Ed. 2d 652, 92 S.Ct. 594."

In the case at bar, on the state of the record at the time of decision on the motion to dismiss, the only appropriate issue for resolution was: Did the complaint set forth a recognized cause of action? It obviously did. The District Court improperly considered matters dehors the record in deciding the motion without affording petitioner the opportunity to present evidence in opposition. See Rule 201, Federal Rules of Evidence. The motion to dismiss was thereby improperly transformed into a motion for summary judgment. Had the letter of the procedural

law been followed the Court would have been advised of the applicable provisions of the Milwaukee Charter and Code of Ordinances which refute respondents claim of service "at pleasure", see Secs. 4.28, Milwaukee Charter, and 2-3-Milwaukee Code of Ordinances.

(B) ON A BALANCING OF INTERESTS TEST THE FIRST AMENDMENT RIGHTS OF PETITIONER WERE NOT OUTWEIGHED.

With respect to the merits of the case the Court of Appeals rationale in determining that the First Amendment rights of the petitioner could be abridged by the respondents is not persuasive. The argument that there must be total conformity of thought and agreement by the City Attorney and petitioner otherwise confrontation may occur and "a nightmare" come to pass for the City Attorney's office is not soundly based. In essence it is a parade of horribles without any basis in fact in the case at bar or from experience. No "feud" developed in the case at bar nor was there a confrontation on any issue except the attempts of the petitioner to exercise his First Amendment rights. It is respectfully submitted that the balancing of interest cannot justify the abrogation of the petitioner's First Amendment rights.

(C) THE EQUAL PROTECTION VIOLATION CAUSE OF ACTION WAS IGNORED.

The complaint alleges that the petitioner was denied equal protection by the acts of the respondents in discharging him from his employment, asserting specifically in the second cause of action that the right to engage in active politics and run for elective office was one recognized in

the community and a right afforded those in similar employment. Ironically, the respondent, Brennan, himself had obtained his position as City Attorney when he ran for that office while employed as an Assistant District Attorney for Milwaukee County. This issue of equal protection was not addressed by either the Court of Appeals or the District Court.

CONCLUSION

For the reasons stated above certiorari should be granted and the decision of the United States Court of Appeals for the Seventh Circuit dated July 11, 1977 should be reversed.

Respectfully submitted,

ROBERT E. SUTTON
Attorney for Petitioner

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 77-1006

JAMES NEWCOMB,

Plaintiff-Appellant,

v.

JAMES BRENNAN and HENRY REUSS,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 76 C 357—**Robert W. Warren**, *Judge.*

ARGUED MAY 24, 1977—DECIDED JULY 11, 1977

Before SWYGERT and CUMMINGS, *Circuit Judges*, and MARKEY, *Chief Judge.*

SWYGERT, *Circuit Judge.* Plaintiff James Newcomb contends that his constitutional rights were violated when he was dismissed from his position as deputy city attorney of Milwaukee, Wisconsin. Newcomb was dismissed when, against the wishes of the city attorney, he announced his intention to run for Congress. We affirm the district court's dismissal of the complaint.

[1] The Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

I.

In April 1976 Newcomb was employed by the City of Milwaukee as deputy city attorney. His superior was defendant James Brennan, the city attorney of Milwaukee. Newcomb informed Brennan that he intended to run in the Democratic Party's primary election for the office of representative from the Fifth District to the Congress of the United States, a post then held by defendant Henry Reuss. After allegedly consulting with Reuss, Brennan informed plaintiff that he disapproved of the candidacy and that plaintiff would be fired if he persisted in his plans to run for office. Following the formal announcement of plaintiff's candidacy and upon his continued refusal to withdraw from the race, Brennan fired plaintiff on May 3, 1976.

Newcomb then filed suit against Brennan and Reuss seeking injunctive and monetary relief for deprivation of his constitutional rights under 42 U.S.C. §§ 1983 and 1985. The district court granted a motion to dismiss the action on November 15, 1976, stating that plaintiff's discharge did not constitute a deprivation of his constitutional rights. The court acknowledged the general rule, established in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Illinois State Union Council 34 v. Lewis*, 473 F.2d 561 (7th Cir. 1972), that the dismissal of public employees for reasons of political patronage violates the First Amendment. The court noted, however, that both *Elrod* and *Lewis* created an exception to this general rule for public employees who occupy policymaking positions, and it held that plaintiff fell within this exception. It observed that the deputy city attorney is exempted from civil service,[2] has no term of office that is established in the City Charter, and has broad powers

[2] Wis. Stat. § 63.29(1) provides:

Civil Service for attorneys in office of city attorney.

(1) In any city of the first class the common council may by ordinance provide for civil service in the office of the city attorney except for the city attorney and his deputy.

and duties described in both the City Charter[3] and the Milwaukee Code of Ordinances.[4] From this judicial

[3] Milw. City Charter § 3.03 reads:

3.03 *City attorney, duties and powers.* The city attorney shall conduct all the law business of the corporation and of the departments thereof, and all other law business in which the city shall be interested, when so ordered by the common council. He shall, when required, furnish written opinions upon subjects submitted to him by the mayor or the common council, or any of its committees, or any other department of the municipal government. He shall keep a docket of the cases to which the city may be a party in any court of record as directed by the common council, in which shall be briefly entered all steps taken in each cause, and which shall, at all times, be open to the inspection of the mayor, comptroller, or any committee of the common council. It shall also be the duty of the city attorney to draft all ordinances, bonds, contracts, leases, conveyances, and other such instruments of writing as may be required by the business of the city; to examine and inspect tax and assessment rolls, and all proceedings in reference to the levying and collection of taxes and assessments; and to perform such other duties as may be prescribed by the charter and ordinances of the city. He shall have power to appoint a deputy city attorney, who shall be authorized to do all acts required by law of the city attorney. Assistant city attorneys appointed by the city attorney pursuant to city service laws and provisions shall be authorized, subject to the control and supervision of the city attorney or his deputy to do all acts required by law of the city attorney; provided that the city attorney shall be responsible to the city for all the acts of such deputy city attorney and assistant city attorneys.

[4] Milw. Code of Ordinances § 2-200.2(2) provides:

DEPUTY CITY ATTORNEY.

There is hereby created the position of deputy city attorney who shall be appointed by the city attorney and such position shall not be under civil service, and the city attorney shall be responsible for all the acts of such deputy city attorney. The deputy city attorney may be selected from among the assistant city attorneys in the office of the city attorney and, if so selected from among such group, while serving as deputy city attorney, such assistant shall continue to retain his civil service status and tenure provided for in this ordinance. The deputy city attorneys shall be required to take the oath of office as provided in the charter and may perform all duties and have all responsibility which are imposed by law in the ordinances and charter ordinances of the city on the city attorney.

notice of matters of public record, the court found that the deputy city attorney occupies a policymaking position and serves at the pleasure of the city attorney. Plaintiff now appeals the district court's decision.

II.

The gravamen of plaintiff's case is that his right to run for political office was protected under the First Amendment and that defendants abridged that right by causing him to be fired because he exercised it. The district court assumed that plaintiff's act of running for Congress was protected under the First Amendment and dismissed the complaint because it found, under the teaching of *Elrod* and *Lewis*, that the state's interest in permitting the city attorney to dismiss his subordinate for political reasons was of sufficient importance to justify the abridgment of plaintiff's First Amendment rights. Because we believe there is a substantial question whether the First Amendment encompasses plaintiff's interest in running for political office, we must resolve this issue before addressing the district court's reasons for dismissing the action.

Although the Supreme Court has frequently invalidated state action which infringed a candidate's interest in seeking political office, it "has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review." *Bullock v. Carter*, 405 U.S. 134, 142-43 (1972). Rather, it has relied on the right of association guaranteed by the First Amendment in holding that state action which denies individuals the freedom to form groups for the advancement of political ideas, as well as the freedom to campaign and vote for the candidates chosen by those groups, is unconstitutional absent a strong subordinating interest. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 39-59 (1976) (*per curiam*); *Bullock v. Carter*, 405 U.S. 134 (1972); *Williams v. Rhodes*, 393 U.S. 23 (1968). These decisions indicate that plaintiff's interest in seeking office, by itself, is not entitled to constitutional protection. *See Developments in the Law—Elections*, 88 Harv. L. Rev. 1111, 1135 n. 81, 1218 (1975). Moreover, since plaintiff

has not alleged that by running for Congress he was advancing the political ideas of a particular set of voters, he cannot bring his action under the rubric of freedom of association which the Supreme Court has embraced.

We would therefore have to affirm the dismissal of the complaint without ever reaching the ground on which the district court relied if plaintiff's First Amendment claim was based solely on a purported right to seek public office. As we read the complaint, however, it implicates interests which are broader than a *per se* right to candidacy. This is not a case where the plaintiff was denied access to the ballot as a result of the state's administration of a facially neutral program regulating elections. *See, e.g., American Party v. White*, 415 U.S. 767 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971). Instead it is a case where the plaintiff's candidacy was burdened because a state official wished to discourage that candidacy in particular. Accordingly, if we assume that the allegations contained in the complaint are true, Brennan's conduct in firing plaintiff because Brennan disapproved of plaintiff's candidacy represented punishment by the state based on the content of a communicative act. The Supreme Court has repeatedly struck down state action regulating the content of expression. *E.g., Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972). *See also Hudgens v. NLRB*, 424 U.S. 507, 520 (1976). Thus, plaintiff's interest in running for Congress and thereby expressing his political views without interference from state officials who wished to discourage the expression of those views lies at the core of the values protected by the First Amendment.

We conclude that under the circumstances of this case plaintiff's interest in seeking office was protected by the First Amendment. Moreover, *Elrod* made clear that the state has no greater power to dismiss a public employee because he exercised a First Amendment right than it has to directly restrain free expression. 427 U.S. at 358-59. *See also Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Therefore, the dismissal of the complaint can only be affirmed if the state's interest in permitting the

city attorney to fire his deputy for political reasons is of sufficient importance to justify the infringement of plaintiff's First Amendment rights.

III

A.

The district court's decision that in this case the state's interest outweighed individual rights turned on a finding that plaintiff was a policymaker. Plaintiff contends first that the district court erred in making this determination because it took judicial notice of facts not alleged in the complaint. He argues that on a motion to dismiss the court may consider matters outside the complaint only if these matters have been affirmatively presented to the court by the litigants. If the court decides not to exclude these matters, he asserts, it must then treat the motion as one for summary judgment and give the parties adequate opportunity to present pertinent material.

We cannot accept this argument. A court may take judicial notice of facts of "common knowledge" in ruling on a motion to dismiss. *Robinson v. Mammoth Life & Accident Ins. Co.*, 454 F.2d 698, 699 (7th Cir. 1971) (*per curiam*), *cert. denied*, 409 U.S. 872 (1972). We hold that matters of public record such as state statutes, city charters, and city ordinances fall within the category of "common knowledge" and are therefore proper subjects for judicial notice.

We must also reject plaintiff's further argument that the district court's determination that he occupied a policymaking position was erroneous even if the court properly took judicial notice of facts not alleged in the complaint. Although, as the Supreme Court noted in *Elrod*, "no clear line can be drawn between policymaking and nonpolicymaking positions, the nature of the responsibilities is critical" in resolving this issue. "An employee with responsibilities that are not well defined or are of a broad scope more likely functions in a policymaking position." 427 U.S. at 367-68. As deputy city attorney, plaintiff was given all the duties imposed

by law on the city attorney,[5] including conducting all the law business of the city, drafting ordinances, and supervising assistant city attorneys.[6] Moreover, under the Milwaukee City Charter he was in line to succeed the Mayor of the City of Milwaukee if a vacancy occurred in that office. We agree with the district court that these facts clearly established that plaintiff's duties were of the "broad scope" which the *Elrod* Court equated with a policymaking function.

B.

Plaintiff's final argument is that, even if he was a policymaker, the state's subordinating interest was insufficient to justify the abridgment of his First Amendment rights. He contends that the purpose of the policymaker exception contained in *Elrod* and *Lewis* is to ensure that the policies of a new administration are not frustrated by holdover employees from the old administration who are likely to be members of a different political party with different political philosophies. He asserts that in this case, by contrast, there is neither any evidence that he and Brennan are members of different political parties nor reason to think that his action in running for Congress would impede Brennan's performance of his duties as city attorney.

Plaintiff's interpretation of the scope of the policymaker exception in *Elrod* is not without merit. The language of the opinion[7] indicates that the Court's

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[5] *See* note 4 *supra*.

[6] *See* note 3 *supra*.

[7] The relevant portion of the Court's opinion stated:

> A second interest advanced in support of patronage is the need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate. The justification is not without force, but is nevertheless inadequate to validate patronage wholesale. Limiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end. Nonpolicymaking individuals usually have only limited responsibility and are therefore not in a position to thwart the goals of the in-party. 427 U.S. at 367.

primary concern was with preventing employees who are members of a defeated political party from undercutting the policies of a new administration representing a different political party and thereby frustrating the will of the electorate. And while the language of Mr. Justice (then Judge) Stevens in *Lewis*[8] creating an exception to the general rule that public employees may not be fired for political reasons is broader than the Supreme Court's language in *Elrod*, the plaintiffs in *Lewis* were all employees who had been dismissed from government jobs because they refused to profess allegiance to the Republican Party. Thus, neither *Elrod* nor *Lewis* squarely faced the question of whether the policymaker exception should be extended beyond the paradigm situation in which a dismissed employee would, by the nature of his political affiliation, retard the effectuation of a new administration's policies.

We therefore must determine as a matter of first impression whether the state's interest in permitting Brennan to fire plaintiff outweighs plaintiff's First Amendment rights. We conclude that it does.

The deputy city attorney of Milwaukee functions in a highly discretionary role. He cannot perform his job by the simple exercise of ministerial competence. Rather, many of the decisions that he makes will involve implementation of the policies of the city attorney's office as a whole. Some of these decisions will actually create policy.

The elected official responsible for setting the policy of the city attorney's office is the city attorney himself. One of the major problems that he confronts in his job is ensuring that his policies are carried out by his subordinates, and that any policy-creating decisions

[8] The court in *Lewis* stated:

> Plaintiffs properly do not challenge the public executive's right to use political philosophy or affiliation as one criterion in the selection of policy-making officials. Moreover, considerations of personal loyalty, or other factors besides determination of policy, may justify the employment of political associates in certain positions. 473 F.2d at 574.

made by those subordinates conform with the broad objectives he chooses to pursue. This problem would become a nightmare for the city attorney unless he could demand the absolute loyalty of his policymaking deputy. If he lost confidence in his deputy, for whatever reason, his ability to perform his job would be severely hampered. Moreover, once an open rift developed between the city attorney and his deputy—even if the basis for the feud were unrelated to actual job performance—the city attorney's office could become a battleground in which little was accomplished, to the detriment of the citizens of Milwaukee. It is presumably for this reason that the Milwaukee City Charter and City Code permit the city attorney unfettered discretion to select his deputy and exclude the position of deputy city attorney from the civil service tenure which lesser attorneys in the city attorney's office receive.

The important public interest in permitting the city attorney to effectively implement his policies justified Brennan's action in firing plaintiff. Brennan obviously regarded plaintiff's refusal to drop his candidacy as an expression of disloyalty. Whether Brennan made a wise decision is beside the point, for it is not our function to judge the wisdom of the actions taken by municipal officials. Brennan had the power under state law and the City Code to dismiss his deputy for reasons of personal loyalty, and we hold that under the circumstances of this case his right to exercise that power was sufficiently important to override the First Amendment rights of plaintiff.[9]

[9] Since Brennan is not liable under the facts alleged, it follows that the mere allegations of conspiracy between defendants Reuss and Brennan are insufficient to establish the liability of Reuss under color of state law for purposes of 42 U.S.C. §§ 1983 and 1985. *Hansen v. Ahlgrimm*, 520 F.2d 768 (7th Cir. 1975).

We agree with the district court that in deciding this case we need not reach the question of whether under the First Amendment Brennan could have fired plaintiff for reasons of racial, sexual, or religious bias.

The judgment of the district court is affirmed.

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APPENDIX B

DECISION OF DISTRICT COURT
(Formal Portions Omitted)

This is a civil action arising under 42 U.S.C. §§ 1983, 1985 and 28 U.S.C. § 1343 whereby the plaintiff above named seeks to recover damages and to enjoin and declare as unconstitutional certain deprivations of plaintiff's rights under the First, Ninth, and Fourteenth Amendments to the Constitution of the United States.

The political controversy which gave use to the instant action began in early April, 1976 when the plaintiff decided to announce his candidacy for the 5th Congressional District of Wisconsin. Plaintiff at that time was employed as the Deputy City Attorney of the City of Milwaukee. Prior to any formal announcement, plaintiff informed defendant James Brennan of his decision. Brennan, the City Attorney and the man responsible for hiring plaintiff, it is alleged, subsequently discussed the matter with defendant Henry Reuss, the incumbent Congressman from the 5th Congressional District. The two defendants allegedly agreed to coerce plaintiff into withdrawing his proposed candidacy by threatening to terminate his employment.

Allegedly, pursuant to this conspiracy, on April 23, 24 and 25, Brennan informed plaintiff that he disapproved of the proposed candidacy. Plaintiff was further advised that he would be fired if he persisted in running against defendant Reuss. Notwithstanding the foregoing, plaintiff announced his candidacy for the 5th Congressional District on April 26, 1976.

During the next week, the defendants allegedly conferred on the matter and defendant Brennan again threatened to fire plaintiff. Plaintiff refused to withdraw from the race, and on May 3, 1976, plaintiff was removed from his posi-

tion as Deputy City Attorney. Plaintiff commenced this action the same day and defendants subsequently moved to dismiss pursuant to rule 12 of the Federal Rules of Civil Procedure upon the ground that the complaint fails to state a claim upon which relief can be granted. The various other motions in the record need not be addressed in light of the following disposition of the motions to dismiss.

From the outset, it should be noted that the nature of plaintiff's position as a Deputy City Attorney is critical to the claim asserted herein. The Deputy City Attorney is specifically exempted from civil service by Section 63.29(1) of the Wisconsin Statutes.[1] No term of office is established by the City Charter and it is readily apparent that the deputy city attorney serves at the pleasure of the City Attorney. The duties are described in Section 3.03 of the Milwaukee City Charter which provides in pertinent part as follows:

> "... He [the city attorney] shall have power to appoint a deputy city attorney, who shall be authorized to do all acts required by law of the city attorney . . ."

The position of deputy city attorney is also described in Section 2-200.2(2) of the Milwaukee Code of Ordinances.[2] A brief review of the statutory framework recited herein clearly reveals that the deputy city attorney occupies a "policy-making" position. While no clear line distinguishes policy-making from nonpolicy-making positions," an employee with responsibilities that are not well defined or are of broad scope more likely functions in a policy-making position." *Elrod* v. *Burns,* 44 U.S.L.W. 5091, 5097 (June 28, 1976).

As the number two man in the City Attorney's office, plaintiff was directly responsible for the implementation of the policies of the City Attorney. The highly political and

sensitive nature of the position is self-evident. The sole question presented therefore is whether an individual in such a policy-making position may be discharged for reasons which are concededly political in nature and yet unrelated to the duties and responsibilities of that position.

Both the Supreme Court and the Seventh Circuit Court of Appeals have distinguished the situation involving patronage dismissals of policy-making employees from that involving nonpolicy-making employees. *Elrod* v. *Burns, supra; Illinois State Employees Union, Council 34* v. *Lewis,* 473 F.2d 561 (7th Cir. 1972). In *Lewis,* the Court went on to state that:

> Plaintiffs properly do not challenge the public executive's right to use political philosophy or affiliation as one criterion in the selection of policy-making officials. Moreover, considerations of *personal loyalty,* or other factors besides determination of policy, may justify the employment of political associates in certain positions. (emphasis added) Id. at 574.

The Supreme Court also alluded to the need for *inter alia,* political loyalty in the selection or discharge of policy-making employees.

> A second interest advanced in support of patronage is the need for political loyalty of employees. . . . The justification is not without force, but is nevertheless inadequate to validate patronage wholesale. Limiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end. *Elrod,* supra, at 5097.

Plaintiff argues that the patronage cases alluded to above are inopposite because the case at bar involves the infringement of an individual's right to seek political office and not

mere party affiliation. Although the right to seek political office is an important one, this Court is unable to distinguish the political nature of the deprivation alleged herein from those encountered in the patronage cases.[3] Moreover, plaintiff overlooks the breach of loyalty involved in plaintiff's attempt to unseat an apparent political friend and ally of the person at whose pleasure he serves. It is extremely difficult to ignore the obvious political overtones of the controversy presented herein. The Court is extremely hesitant to find a constitutional deprivation everytime a policy-making employee is dismissed for political reasons of some sort or another. The federal district court should not be used to settle interparty squabbles and, accordingly, the Court is of the opinion that plaintiff's discharge failed to give rise to a constitutional deprivation.

For the foregoing reasons,

IT IS ORDERED that the motions to dismiss brought in behalf of defendants Brennan and Reuss be and are hereby GRANTED.

So ordered this 15 day of November, 1976 at Milwaukee, Wisconsin.

/s/ *Robert W. Warren*
United States District Judge

FOOTNOTES:

[1] Section 63.29(1), Wis. Stats:

Civil Service for attorneys in office of city attorney.

(1) In any city of the first class the common council may by ordinance provide for civil service in the office of the city attorney except for the city attorney and his deputy.

[2] Section 2-200.2(2), Milwaukee Code of Ordinances:

(2) DEPUTY CITY ATTORNEY.

There is hereby created the position of deputy city attorney who

(footnote continued)

(footnote continued)

shall be appointed by the city attorney and such position shall not be under civil service, and the city attorney shall be responsible for all the acts of such deputy city attorney. The deputy city attorney may be selected from among the assistant city attorneys in the office of the city attorney and, if so selected from among such group, while serving as deputy city attorney, such assistant shall continue to retain his civil service status and tenure provided for in this ordinance. The deputy city attorney shall be required to take the oath of office as provided in the charter and may perform all duties and have all responsibility which are imposed by law in the ordinances and charter ordinances of the city on the city attorney.

[3] In *Elrod*, "[employees] were required to pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party, usually at the price of one of the first three alternatives." 44 U.S.L.W. at 5094.

Notwithstanding the substantial infringement of plaintiffs' First Amendment rights of political belief and association alluded to above, the Court recognized an exception for those plaintiffs who were involved in policy-making positions. The substantial infringement of First Amendment rights involved in the instant case is, in the opinion of this Court, analogous to that found in *Elrod*. The Court expresses no opinion with regard to dismissals which are based on *nonpolitical* grounds such as race or sex and this opinion should not be construed as standing for the proposition that policy-making employees may be discharged for discriminatory reasons. *See*, Perry v. Sindermann, 408 U.S. 593 (1972).

APPENDIX C

COMPLAINT
(Formal Portions Omitted)

I. JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1343, 42 U.S.C. 1983 and 1985. This is an action to recover damages and also to enjoin and declare as unconstitutional certain deprivations of plaintiff's rights under the First, Ninth and Fourteenth Amendments to free speech, due process and equal protection of the laws.

II. PARTIES

1. That the plaintiff is an adult residing at 8927 N. 70th Street, Milwaukee, and is an attorney by profession, and that prior to May 3, 1976 he was employed by the City of Milwaukee as the Deputy City Attorney of the City of Milwaukee.

2. That the defendant James Brennan, is an adult residing at 2756 N. 87th Street, Milwaukee, and is an attorney by profession and was at all times material herein the duly elected City Attorney for the City of Milwaukee.

3. That the defendant, Henry Reuss, is an adult purporting to reside in the City of Milwaukee and was at all times material herein the duly elected representatives to the Congress of the United States from the 5th Congressional District of Wisconsin with offices located at 517 E. Wisconsin Avenue, Milwaukee.

III. FIRST CAUSE OF ACTION

4. That during the month of April, 1976 the plaintiff did decide to announce his candidacy for the office of Congressional Representative to the Congress of the United States from the 5th Congressional District of Wisconsin and run against the defendant Henry Reuss in the primary election of the Democratic party.

5. That plaintiff did communicate his intention to run for public office to the defendant Brennan early in April, 1976, and the defendant Brennan initially did not evidence objection to the plaintiff's plans.

6. That plaintiff is informed and verily believes that after plaintiff advised defendant Brennan of his intentions the defendant Brennan did communicate with the defendant Reuss and with other persons unknown to plaintiff prior to the formal announcement by plaintiff of his candidacy, and that the defendant Brennan did conspire with the defendant Reuss and the persons unknown and agreed to attempt to coerce the plaintiff to persuade him to withdraw his proposed candidacy by threatening to terminate his employment.

7. That the defendant Brennan in furtherance of the conspiracy above-described did communicate threats to the plaintiff on April 23, 24 and 25, 1976 that unless plaintiff reconsidered his planned announcement and intention to run against defendant Reuss, that the plaintiff would be fired from his employment as Deputy City Attorney.

8. That on April 26, 1976 the plaintiff announced his candidacy to run against the defendant Henry Reuss.

9. That plaintiff is informed and verily believes that between April 26, 1976 and May 3, 1976 the defendants

Brennan and Reuss together with other persons unknown to plaintiff did conspire to accomplish the discharge of the plaintiff from his employment; during said period the defendant Brennan did confer with the defendant Reuss and others and in furtherance of the conspiracy did attempt to coerce plaintiff into withdrawing from the election by threatening that if he did not withdraw he would be fired.

10. That in furtherance of the conspiracy on May 3, 1976, the defendant Brennan did wrongfully discharge the plaintiff from his employment solely because plaintiff continued his intention to run against defendant Reuss.

11. That the discharge of the plaintiff was with the full knowledge and agreement of the defendant Reuss.

12. That the defendants and each of them acted intentionally and with malice and ill will toward plaintiff to wrongfully terminate the employment of the plaintiff in order to render him financially incapable of supporting his family and maintaining a political campaign against the defendant Reuss, in order to guarantee the re-election of the defendant Reuss.

13. That the acts of the defendants in furtherance of the conspiracy were under color of State and Municipal law.

14. That the discharge of the plaintiff pursuant to the conspiracy of the defendants was in violation of the rights guaranteed the plaintiff by the Constitution of the United States and the First, Ninth and Fourteenth Amndments thereof.

IV. SECOND CAUSE OF ACTION

15. Plaintiff realleges and incorporates by reference herein the allegations contained in the above paragraphs 1 through 14 as if fully set forth.

16. The acts of defendants Brennan, Reuss and others as described above, did individually and arbitrarily discriminate against plaintiff in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution specifically in that it was the recognized policy and practice to allow attorneys employed as city attorneys in the City of Milwaukee, or district attorneys in the County of Milwaukee to conduct political campaigns and pursue election to political office while retaining their positions on the staff of the municipal or county agencies.

V. REQUEST FOR RELIEF

17. That as a direct and proximate result of the intentional, malicious conspiracy aforedescribed and acts of the defendants in furtherance thereof, plaintiff was damaged and will be damaged in the future as follows:

a) loss of employment;

b) injury to reputation;

c) embarrassment, humiliation and mental anguish, all to his damage in the amount of One Million Five Hundred Thousand Dollars ($1,500,000).

18. That the defendants, in the course of the conspiracy to wrongfully terminate the employment of the plaintiff acted recklessly, intentionally and maliciously and in wanton disregard of the rights of the plaintiff and that by reason thereof the plaintiff is entitled to punitive and

exemplary damages in the amount of Three Million Dollars ($3,000,000).

WHEREFORE, the plaintiff, James Newcomb, demands judgment against the defendants and each of them jointly and severally in the amount of One Million Five Hundred Thousand Dollars ($1,500,000) compensatory damages and Three Million Dollars ($3,000,000) punitive damages, together with costs and reasonable attorney's fees.

/s/ *Robert E. Sutton*
Robert E. Sutton
Attorney for Plaintiff

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Milwaukee, Wisconsin 53211

APPENDIX D

DOCKET ENTRIES

Plaintiffs—NEWCOMB, James

Defendants—BRENNAN, James
REUSS, Henry

Cause—Civil rights action alleging unconstitutional termination of employment.

Attorneys—

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For defendant Brennan
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Robert H. Friebert
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Milwaukee, WI 53203
271-0130

Date	Nr.	Proceedings
5/25/76	1.	Complaint filed; summons issued. Jury demand.
6/ 4/76	2.	Notice of retainer of Maurice L. Markey, Thomas E. Hayes, Grant F. Langley & Patrick B. McDonnell, attorneys for deft. Brennan.

6/ 7/76	3.	Marshal's return of service of S & C; deft. Brennan served on 5/26/76, deft. Reuss served on 5/25/76.
6/14/76	4.	Deft. Brennan's motion to dismiss.
6/14/76		Deft. Brennan's brief in support of motion to dismiss.
6/15/76	5.	Deft. Reuss's motion to dismiss.
6/15/76		Deft. Reuss's brief in support of motion to dismiss.
6/15/76	6.	Deft. Reuss's motion for a more definite statement.
6/15/76		Deft. Reuss's brief in support of motion to make a more definite and certain statement.
6/21/76	7.	Deft. Reuss's motion for protective order.
6/21/76	8.	Notice of hearing on deft Reuss's motion for a protective order to be held on 6/23/76.
6/23/76	9.	Order (RWW) granting deft. Reuss's motion for a protective order; further ordered that the depositions scheduled for 6/24/76 by the pltf. not be held on that date.
7/ 7/76	10.	Marshal's return of service of summons & complaint; deft. Reuss served 7/2/76.
7/22/76	11.	Motion of deft. Henry S. Reuss for a protective order.
7/23/76	12.	Motion of deft. James Brennan for a protective order, with supporting brief.

8/ 5/76	13.	Order (RWW) denying subject motions for entry of an order barring discovery until resolution of the motion to dismiss.
8/12/76	14.	Pltf's motion for an order compelling discovery with supporting brief.
8/25/76		Defts' brief in opposition to pltfs' motion for an order compelling discovery.
8/25/76	15.	Affidavit of Jean K. Carney.
9/15/76		Deposition of Ron Marose, taken on 8/23/76 at Milw. Wis. by pltf.
9/15/76		Deposition of James Brennan, taken on 8/3/76 at Milw. Wis. by pltf.
9/16/76		Deposition of Jean K. Carney, taken on 8/3/76 at Milw. Wis. by pltf.
9/30/76		Deposition of Henry Reuss, taken at Milwaukee, Wisconsin on 8/18/76 at Milw., Wis. by plaintiff.
10/12/76	16.	Deft. Reuss's request for production of documents.
10/18/76		Deposition of Kenneth Lamke taken at the instance of the pltf. in Milwaukee, Wisconsin, on 8/3/76.
11/15/76	17.	Memorandum and order (RWW) granting defts' motions to dismiss.
11/15/76	18.	Judgment entered; copies mailed to the parties.

11/16/76		Status report (RWW).
11/22/76	19.	Pltf's notice of appeal to the U.S. Court of Appeals, 7th Circuit; copy mailed to parties.
11/22/76		Copy of docket entries and notice of appeal sent to U. S. Court of Appeals, 7th Circuit.
12/27/76	20.	Letter from pltf's. atty. complying with Rule 4(a).
		Certificate of Clerk.

Supreme Court, U. S.
FILED
NOV 7 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-519

JAMES NEWCOMB,

Petitioner,

— vs. —

JAMES BRENNAN and HENRY REUSS,

Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT, JAMES BRENNAN, IN OPPOSITION

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PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT, JAMES BRENNAN, IN OPPOSITION

I.

FACTS

This case was presented to both the U.S. District Court for the Eastern District of Wisconsin and the Seventh Circuit Court of Appeals (see *Newcomb v. Brennan*, 558 F. 2d 825 [7 Cir., 1977]) solely upon the complaint of the plaintiff and the motions to dismiss interposed by both defendants. Therefore, at this stage of proceedings, the facts now before this court for consideration are the well-pled allegations of the com-

plaint (see *National Van Lines, Inc. v. United States*, 326 F. 2d 362, 372 [7 Cir., 1964] and *United Milk Prod. Co. v. Michigan Ave. Nat. Bank of Chicago*, 401 F. 2d 14 [7 Cir., 1968]); all reasonable inferences which can be drawn from those well-pled allegations (see *Curtis v. Everette*, 489 F. 2d 516, 518 [3 Cir., 1973]); and facts of "common knowledge" such as state statutes and local ordinances, of which the court can take judicial notice (see *Robinson v. Mammoth Life and Accident Insurance Co.*, 454 F. 2d 698, 699 [7 Cir., 1971] [per curiam], cert. denied 409 U.S. 872 [1972]).

Thus, the facts properly before the lower courts for consideration were as follows:

First, the petitioner alleges in paragraph 1 of the complaint that ". . . prior to May 3, 1976 he was employed . . . as the Deputy City Attorney of the City of Milwaukee." (A.P. 16)

It is submitted that the title of "Deputy City Attorney of the City of Milwaukee" is a term of art which finds its definition in certain statutes and ordinances of the State of Wisconsin and the City of Milwaukee; and therefore, the District and Circuit Courts properly took judicial notice of those statutes and ordinances in their deliberations relative to defendants' motions to dismiss.

The deputy city attorney's position is initially described in Sec. 3.03, Milwaukee City Charter, as follows:

> ". . . He [the city attorney] shall have power to appoint a deputy city attorney, who *shall be authorized to do all acts required by law of the City Attorney . . .*" (Emphasis added) (Since amended 5/24/77)

The duties of the Milwaukee city attorney are described in the initial part of that Charter Ordinance as follows:

> "The City Attorney shall conduct all the law business of the corporation and of the departments thereof, and all other law business in which the city shall be interested, when so ordered by the Common Council. He shall, when required, furnish written opinions upon subjects submitted to him by the Mayor or the Common Council, or any of its committees, or any other department of the municipal government. He shall keep a docket of the cases to which the city may be a party in any court of record as directed by the Common Council, in which shall be briefly entered all steps taken in each cause, and which shall, at all times, be open to the inspection of the Mayor, Comptroller or any committee of the Common Council. It shall also be the duty of the City Attorney to draft ordinances, bonds, contracts, leases, conveyances, and other such instruments of writing as may be required by the business of the city; to examine and inspect tax and assessment rolls, and all proceedings in reference to the levying and collection of taxes and assessments; and to perform such other duties as may be prescribed by the charter and ordinances of the city. . . ." (Since amended 5/24/77)

There is no term of office for the deputy city attorney set forth in the Charter nor is he subject to civil service. In fact, he is specifically exempted from civil service by Sec. 63.29(1), Wis. Stats., which reads:

"*Civil service for attorneys in office of city attorney.* (1) In any city of the first class the common council may by ordinance provide for civil service in the office of the city attorney except for the city attorney and his deputy."

The position of deputy city attorney is also described in Sec. 2-220.2(2), Milwaukee Code of Ordinances:

"(2) DEPUTY CITY ATTORNEY.

"There is hereby created the position of deputy city attorney who shall be appointed by the city attorney and such position shall not be under civil service, and the city attorney *shall be responsible for all the acts of such deputy city attorney.* The deputy city attorney may be selected from among the assistant city attorneys in the office of the city attorney and, if so selected from among such group, while serving as deputy city attorney, such assistant shall continue to retain his civil service status and tenure provided for in this ordinance. The deputy city attorney shall be required to take the oath of office as provided in the charter and *may perform all duties and have all responsibility which are imposed by law in the ordinances and charter ordinances of the city on the city attorney.* (Emphasis added) (Since amended 5/24/77)

It should be noted that the above ordinance does provide civil service status and tenure at the level of assistant city attorney to a deputy city attorney who has been selected from among the group of assistant city attorneys; however, petitioner has not pled, nor would the evidence show, that he was selected from among the group of assistant city attorneys.

Therefore, the petitioner had neither tenure nor civil service status in his position of deputy city attorney. He, in effect, served at the pleasure of the city attorney, who in this case was the respondent Brennan.

The petitioner further alleges at paragraph 6 of the complaint (A.P.) that ". . . defendant Brennan did communicate with the defendant Reuss . . . prior to the formal announcement by plaintiff of his candidacy, and that the defendant Brennan did conspire with the defendant Reuss . . . and agreed to attempt to coerce the plaintiff to persuade him to withdraw his proposed candidacy by threatening to terminate his employment." While this allegation must be taken as true for purposes of the instant motion to dismiss, it is submitted that if the facts were ever fully developed, which will not occur in light of the sustainability of the lower courts' orders, that this allegation would be shown to be untrue.

Petitioner then alleges at paragraph 10 of the complaint (A.P. 18) that ". . . the defendant Brennan did wrongfully discharge the plaintiff from his employment solely because plaintiff continued his intention to run against defendant Reuss."

Thus, in ruling upon the instant motion to dismiss, the lower courts properly took into consideration the statutes and ordinances describing the position of deputy city attorney and concluded that the petitioner occupied a non-tenured policy-making position; and further, after their review of the complaint, they properly drew the "reasonable inference" from the well-pled paragraphs of the complaint set out above

that a political dispute, culminating in the petitioner's discharge, had arisen between the petitioner and respondent Brennan and that the dispute was based upon the petitioner's decision to oppose defendant Reuss ". . . in the primary election of the Democratic party." (A.P. 17)

The District Court, taking into consideration the above factual matters, granted the defendants' motions to dismiss the plaintiff's complaint. The plaintiff appealed that decision to the Seventh Circuit Court of Appeals. The Seventh Circuit affirmed, and the plaintiff then instituted the instant petition for a writ of certiorari requesting that this court review that affirmance.

II.

ARGUMENT

A. PETITIONER'S FIRST QUESTION AND SUBPART (B) OF HIS SECOND QUESTION DO NOT PRESENT APPROPRIATE QUESTIONS FOR REVIEW ON CERTIORARI.

The petitioner's petition presents two question for review in his petition. The first of the questions appears to be related to subpart (B) of the second question; therefore, respondent Brennan will treat both of those questions together. Those questions are:

> "1. Under *Elrod v. Burns* (1976) 427 U.S. 347 is it a violation of the United States Constitution for a deputy city attorney in a non-partisan office to be fired from his employment because he runs for Congress of the United States?

> "2. Did the Circuit Court of Appeals err . . . (B) in its determination that the petitioner's First Amendment rights were outweighed by the interests of the respondents; . . ."

The general consideration governing whether or not this court will undertake of review of a matter on certiorari are set forth in U.S. S. Ct. Rule 19, 28 *U.S.C.A.*

The petitioner has not indicated which, if any, of the Rule 19 grounds might be applicable to any questions that he has presented for review.

He does, however, assert at page 5 of his petition that this case ". . . INVOLVES AN ISSUE OF FIRST IMPRESSION." He bases this assertion on Judge Swygert's statement that:

> ". . . neither *Elrod* nor *Lewis* squarely faced the question of whether the policymaker exception should be extended beyond the paradigm situation in which a dismissed employe would, by the nature of his political affiliation, retard the effectuation of a new administration's policies.
>
> "We therefore must determine as a matter of first impression whether the state's interest in permitting Brennan to fire plaintiff outweighs plaintiff's First Amendment rights. . . ." (A.P. 8)

Therefore, in regard to his first question and subpart (B) of his second question, petitioner is apparently asserting that the Seventh Circuit Court ". . . has decided an important question of federal law which has not been, but should be, settled by this court; . . ." U.S. S. Ct. Rule 19(b), 28 *U.S.C.A.*

For several reasons, respondent Brennan would submit that the question of federal law presented by the petitioner's first question and by subpart (B) of his second question, has already been fully resolved by this court's decision in *Elrod v. Burns*, 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976). However, this assertion should not be construed as an attempt to file a cross petition for review of the Seventh Circuit Court decision, for it is submitted that the result arrived at by the Seventh Circuit Court was entirely consistent with *Elrod* and needs no further review by this court. The only point that respondent Brennan wants to urge upon the court is that the result reached by the Seventh Circuit in this case could have been arrived at while still remaining within the parameters of *Elrod*.

As noted above, the reason the Seventh Circuit considered its decision in the instant matter as a case of first impression is because Judge Swygert concluded that ". . . neither *Elrod* nor *Lewis* squarely faced the question of whether the policy-maker exception should be extended beyond the paradigm situation in which a dismissed employee would, by the nature of his *political affiliation*, retard the effectuation of a new administration's policies." (Emphasis added) (A.P. 8)

However, it is submitted that a closer review of the "paradigm situation" in *Elrod* discloses that it may well have been broader than that described by Judge Swygert; for the issue presented to this court in *Elrod* was ". . . whether public employees who allege that they were discharged or theatened with discharge solely because of their partisan political affiliation or *non-affiliation* state a claim for deprivation of constitutional rights secured by the First and Fourteenth Amendments." (Emphasis added 49 L. Ed. 2d at 551.

Therefore, the question of whether or not an individual could be discharged because he or she *refused to affiliate* with any partisan political party was also considered in *Elrod*. In other words, this court recognized in *Elrod* that a publicly elected official may also question the "political loyalty" of a policymaking subordinate based upon that subordinate's choice to remain a political *non-partisan*.

Hence, *Elrod* did not deal, as petitioner asserts at pages 5 and 6 of his petition, solely with the First Amendment rights of members of the opposing political party. Rather, it is submitted that in *Elrod* this court dealt with the broader question of the circumstances under which a public employe's First Amendment rights must be subordinated to the public interest of ensuring ". . . that policies which the electorate has sanctioned are *effectively* implemented. . . ." (Emphasis added) 49 *L. Ed.* 2d at 565; and this court concluded that that public interest could be fully satisfied by limiting that subordination to "policymaking positions."

Therefore, whether a political dispute which arises between a publicly elected official and a non-tenure policymaking subordinate arises on the level of partisan politics, non-partisan politics, or intraparty politics is not of great importance. What is of importance is the determination of whether or not, as a result of that dispute, the will of the electorate will be frustrated because an elected official is forced to rely upon the services of a policymaking subordinate from whom he

can no longer demand complete loyalty, and that is exactly the determination that Judge Swygert made when he stated that:

> "The elected official responsible for setting the policy of the city attorney's office is the city attorney himself. One of the major problems that he confronts in his job is ensuring that his policies are carried out by his subordinates, and that any policycreating decisions made by those subordinates conform with the broad objectives he chooses to pursue. This problem would become a nightmare for the city attorney unless he could demand the absolute loyalty of his policymaking deputy. If he lost confidence in his deputy, for whatever reason, his ability to perform his job would be severely hampered. Moreover, once an open rift developed between the city attorney and his deputy — even if the basis for the feud were unrelated to actual job performance — the city attorney's office could become a battleground in which little was accomplished, to the detriment of the citizens of Milwaukee. It is presumably for this reason that the Milwaukee City Charter and City Code permit the city attorney unfettered discretion to select his deputy and exclude the position of deputy city attorney from the civil service tenure which lesser attorneys in the city attorney's office receive." (A.P. 8-9)

Therefore, while *Elrod* did not precisely deal with the question of the need for political loyalty on the level of non-partisan or intraparty politics (although as noted above, it did speak in terms of the First Amendment rights of non-partisan employes), it did deal with the more fundamental question of the circumstances under which a public employe's First Amendment rights must be subordinated to the vital

public interest of ensuring that the policies sanctioned by the electorate are effectively implemented; and it was this court's response to that question in *Elrod* that the Seventh Circuit correctly applied to the allegations of the petitioner's complaint.

Further, *Elrod* (see 49 L. Ed. 2d at p. 556, footnote 11) is also based in part upon a footnote in this court's decision in *Pickering v. Board of Education*, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). *Pickering* dealt with the discharge of a teacher because of his exercise of his First Amendment rights. In examining that discharge, Mr. Justice Marshall concluded that:

> ". . . Appellant's employment relationships with the Board and, to a somewhat lesser extend, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that *personal loyalty* and confidence are necessary to their proper functioning. . . ." (Emphasis added) 20 L. Ed. 2d at 818

However, in footnote 3 the court recognized that:

> "3. It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. We intimate no views as to how we would resolve any specific instances of such situations,

but merely note that significantly different considerations would be involved in such cases." 20 L. Ed. 2d at 818

Therefore, the "policymaker" exception enunciated in *Elrod* first arose in the context of a totally *non-partisan* controversy between a teacher and a university Board of Regents, and this court concluded that even on such a non-partisan level there was a possibility that the need for personal loyalty would justify the discharge of a person in a policymaking position.

Thus, the Seventh Circuit application of the *Elrod* doctrine in the instant matter was squarely consistent with the case law, i.e., *Pickering*, upon which that doctrine was, in part, founded.

Hence, it is submitted that the "important question of federal law," which is presented by the instant matter, has already been resolved by this court's decision in both *Elrod* and *Pickering*; and thus, the petitioner's request for certiorari should be denied.

Further, it is significant to note that it was the Seventh Circuit that developed much of the underlying case law, i.e., *Illinois State Employees Union, Council 34, Etc. v. Lewis*, 473 F. 2d 561 (7 Cir., 1972) and *Burns v. Elrod*, 509 F. 2d 1133 (7 Cir., 1975), which formed part of the basis for this court's decision in *Elrod*. Therefore, that circuit is in an excellent position to apply the "policymaker" exception enunciated in *Elrod* to fact situations, which while not being precisely the same as *Elrod*, are highly analogous to the facts dealt with in *Elrod*; and it is submitted that the instant fact situation clearly fits in to that category.

Further, petitioner argues in response to subpart (B) of his second question that there was no "feud" between himself and respondent Brennan; however, his complaint establishes the exact opposite (see par. 7 and 10 of the complaint at A.P. 17-18). For if a political disagreement which results in threats of a discharge, and ultimately a discharge cannot be characterized as a "feud", which could justifiably lead respondent Brennan to question the petitioner's loyalty, then it would be hard to conceive of any fact situation that could be so characterized.

Also of significance is the fact that the petitioner makes no assertion that he was not a policymaker.

Therefore, the Seventh Circuit had before it a complaint which established that the petitioner was a policymaking employe who was fired because his loyalty to his superior had been called into question by his decision to chart a political course contrary to that endorsed by his superior, and the Seventh Circuit correctly applied the teachings of *Elrod* and *Pickering* to those facts by concluding that the petitioner had failed to state a claim upon which relief could be granted.

B. SUBPART (A) OF PETITIONER'S SECOND QUESTION DOES NOT PRESENT AN APPROPRIATE QUESTION FOR REVIEW ON CERTIORARI.

The petitioner also presents two further questions for review. The first of those is:

> "2. Did the Circuit Court of Appeals err (A) in holding that the petitioner served 'at the pleasure' of his employer; . . ."

The petitioner argues in response to that issue that the District Court and the Circuit Court erred by taking "judicial notice" of the statutes and ordinances which describe the position of Milwaukee deputy city attorney, and that by so erring, the petitioner was prevented from presenting to the court, in the context of a motion for summary judgment, other applicable ordinances which would have established that the petitioner did not serve at the pleasure of respondent Brennan. In other words, the petitioner is apparently asserting that he had some sort of a property interest in his deputy city attorney position.

It is interesting to note that the petitioner's argument that he had a property interest in his deputy city attorney position is not addressed in either the District Court's (A.P. 11-14) or the Circuit Court's (A.P. 1-10) opinion; and the reason for this lack of discussion is quite simple; namely, the petitioner never pled in his complaint that he had a property interest in his position. He never made an argument on that point to the District Court, and his brief to the Seventh Circuit Court is also totally devoid of any such argument. Finally, he has not even chose to submit copies of the Milwaukee ordinances establishing his claimed property right in his Appendix to the instant petiton.

Therefore, the petitioner is, in effect, asking this court to undertake a review of this issue without first adequately presenting it to the lower courts; however, this court has always taken a dim view of that sort of advocacy. In *United States v. Ortiz*, 422 U.S. 891, 45 L. Ed. 2d 623, 95 S. Ct. 2585 (1975), Mr. Justice Powell stated:

> "The Government also contends that even if Almeida-Sanchez applies to checkpoint searches, the Court of Appeals erred in voiding this search because it occurred after the date of decision in Almedia-Sanchez but before the Court of Appeals stated in United States v. Bowen, supra, that it would require probable cause for checkpoint searches. Examination of the Government's brief in the Ninth Circuit indicates that *it did not raise this question below*. . . . We therefore *decline to consider this issue*, which was raised *for the first time in the petition for certiorari*." (Emphasis added) (at pp. 629-630)

Also, see *Beck v. Washington*, 369 U.S. 541, 8 L. Ed. 2d 98 at 107, 82 S. Ct. 955 (1962).

Therefore, before even considering whether or not subpart (A) of petitioner's second question merits any consideration under any of the Rule 19 criteria, respondent Brennan would submit that this court should follow the *Ortiz* and *Beck* approach and deny certiorari on that question because the petitioner failed to adequately present it to the lower courts.

However, even viewing that question in the context of the Rule 19 considerations, it is submitted that there is no reason for this court to entertain it on certiorari, and again the petitioner himself fails to advance any such reason.

What in effect the petitioner has done in subpart (A) of his second question is to ask this court to construe the local ordinances of the City of Milwaukee in order to determine whether or not he had some property interest in his deputy city attorney position.

However, this court has consistently held that such a determination is a matter of construction of state and local laws rather than federal constitutional law. (See *Board of Regents v. Roth*, 408 U.S. 564 at 577, 33 L. Ed. 2d 548 at 561, 92 S. Ct. 2701 [1972].) Since this question primarily relates to application of local laws, it is also not a matter for which this court should undertake a review (see *Wolf v. Weinstein*, 372 U.S. 633, 10 L. Ed. 2d 33 at 39, 83 S. Ct. 969 [1963]).

Further, the procedural question posed by the petitioner is resolved by the application of well-settled case law which clearly establishes the right of a federal court, in the context of a motion to dismiss, to take "judicial notice" of facts of common knowledge (see *Robinson v. Mammoth Life and Accident Insurance Co.*, *supra*, at p. 699); and specifically, courts must take "judicial notice" of state statutes applicable to the cause of action under consideration (see *McIndoo v. Burnett*, 494 F. 2d 1311 at 1313 (8 Cir., 1974) and *Merriam v. Kunzig*, 476 F. 2d 1233 at 1239 [3 Cir., 1973]). In fact, the petitioner could have, although he chose not to, asked the lower courts to take judicial notice of the ordinances upon which he now is attempting to rely.

Therefore, when the petitioner pled that ". . . he was employed by the City of Milwaukee as the *Deputy City Attorney* of the City of Milwaukee", (A.P. 16) (Emphasis added), he brought before the court those statutes and ordinances which describe the nature and duties of that position. Those provisions are set forth in the statement of facts, *supra*, and footnotes 2-4 of the Circuit Court's opinion (A.P. 2-3); and it was from those statutes and ordinances that both the District Court

and Circuit Court concluded that the position of deputy city attorney was a policymaking position, a point which the petitioner apparently does not dispute, and that the person serving in that position served at the pleasure of the city attorney.

Further, the lower court's decision with regard to the second point above is consistent with the case law of the State of Wisconsin.

That case law is set forth in two Wisconsin Supreme Court cases which deal with the question of removal from public office where there is no fixed term or tenure rights associated with that office.

The first is *State ex rel. Wagner v. Dahl*, 140 Wis. 301 at 303, 122 N.W. 748 (1909), in which the Wisconsin Supreme Court stated that:

> "It is a well-nigh universal rule that where no definite term of office is fixed by law the *power to remove an incumbent is an incident to the power to appoint*, in the absence of some constitutional or statutory provision to the contrary. . . . Our law does not regard an office as a property right. Neither is the right to hold office a vested one. . . ." (Emphasis added)

The second Wisconsin case is *Ekern v. McGovern*, 154 Wis. 157 at 244, 142 N.W. 595 (1913), in which the Wisconsin Supreme Court stated that:

> " 'The general rule is that *where a definite term of office is not fixed by law, the officer, or officers by whom a person was appointed to a particular office may remove him at pleasure, and without notice, charges, or reasons assigned.* . . . It is conceded, in

all the cases, that where a fixed term is assigned to the office, the appointing power has no absolute power of removal.' Throop, Public Officers, §354." (Emphasis added)

Further, the petitioner's only argument in opposition to the conclusion that he served at the pleasure of respondent Brennan (an argument which, as noted above, is for the first time being adequately presented for judicial scrutiny) is based upon a totally erroneous interpretation of Sec. 4.28 of the Milwaukee City Charter and Sec. 2-3 of the Milwaukee Code of Ordinances.

The intent and construction of those provisions is established by the introductory subsection of Sec. 4.28 of the Milwaukee City Charter which reads as follows in sub. (1):

"4.28 *Common council, power to dismiss officers for malfeasance; investigation procedure and hearing.* (1) A majority of all the members elect of the common council shall have power to dismiss from office, for malfeasance in office in said city, any person elected or appointed to office in said city, except justices of the peace. And the common council shall provide by ordinance the manner of hearing and disposing of complaints against such officers."

That subsection makes it clear that the power to dismiss, which is delineated thereunder, is a power of the Common Council to dismiss elected or appointed officials for malfeasance in office; in other words, an impeachment procedure. However, that provision has no effect on the *collateral power of the city attorney* to remove his deputy who serves at the city attorney's pleasure.

Therefore, while the Common Council can remove an appointed official such as the deputy city attorney only for "malfeasance" in office and only in accordance with Sec. 4.28 of the Milwaukee City Charter and Sec. 2-3 of the Milwaukee Code of Ordinances, the city attorney may remove his deputy for any reason, with the possible exception of a reason based upon racial, sexual, or religious basis. To hold otherwise would be tantamount to saying that once a deputy city attorney is appointed, he has a right to retain his position, in the absence of malfeasance in office, even if the city attorney who appointed him had come to doubt his deputy's loyalty or had been defeated in an election and the new city attorney wished to appoint a new policymaking subordinate loyal to him. Such a holding would be contrary to and destructive of the city attorney's authority to appoint his deputy secured by Sec. 3.03 of the Milwaukee City Charter and Sec. 2-220.2 (2) of the Milwaukee Code of Ordinances (A.P. 3); and it would also render meaningless the deputy city attorney's exclusion from the tenure status conferred on other members of the City Attorney's Office by the Civil Service system in accordance with Sec. 63.29(1), Wis. Stats. (A.P. 2).

Therefore, while it is true that the petitioner, and respondent Brennan for that fact, could be removed by the *Common Council* only on the basis of malfeasance in office, the ordinances of the City of Milwaukee and statutes and case law of the State of Wisconsin, in delineating the relationship between the city attorney and his deputy, clearly establish that the deputy city attorney serves at the pleasure of the city attorney.

Finally, respondent Brennan has dealt with the merits of the petitioner's argument on this point only to establish that had the petitioner properly presented that argument to the lower tribunals, they would have found it without merit; however, since it was not properly presented and since even if it had been, it would not rise to the dignity of an issue which should be reviewed by this court under the Rule 19 criteria, it is submitted that this court should deny review of that issue.

C. SUBPART (C) OF PETITIONER'S SECOND QUESTION DOES NOT PRESENT AN APPROPRIATE QUESTION FOR REVIEW ON CERTIORARI.

The final question that the petitioner proposes is:

> "2. Did the Circuit Court of Appeals err . . .(C) in failing to address the equal protection cause of action pleaded as a second cause of action in the complaint?"

As with subpart (A) of the petitioner's second question, that issue was not properly raised before either the District Court or Circuit Court.

That failure explains the absence of any discussion of the second cause of action by either of the lower courts in their written decisions.

Hence, while it is true that the petitioner advanced his second cause of action in his pleadings, he effectively abandoned it in subsequent proceedings before the District and Circuit Courts by failing to make any argument on that cause. Therefore, in light of this court's holdings in *United States v. Ortiz, supra,*

and *Beck v. Washington, supra,* this court should decline to consider subpart (C) of the petitioner's second question since it ". . . was never properly presented to the [lower courts] . . ." *Beck v. Washington, supra,* at p. 107.

The reason for the petitioner's abandonment of his second cause of action may well have been the realization of that cause's lack of merit. A review of the limited argument on this point in his petition would seem to substantiate that belief; and, again, as with all the other questions that he has presented for review, the petitioner fails to mention which Rule 19 consideration would be brought into play by his second cause of action. Respondent Brennan would submit that there are none; and hence, even if this cause had been argued in the lower courts, it would not have changed the ultimate result reached by those courts nor would it have presented an issue for review by this court.

The meritless nature of petitioner's second cause of action becomes evident upon close examination of that cause, and more specifically, close examination of paragraph 16 of the complaint (A.P. 19).

The effect of that allegation is to assert that petitioner's right to equal protection under the law was denied by the "policy and practice" of a public official or public agency which he fails to identify, which allowed ". . . attorneys employed as city attorneys in the City of Milwaukee, or district attorneys in the County of Milwaukee to conduct political campaigns and pursue election to political office while retaining their positions on the staff of the municipal or county agencies." (A.P. 19)

Therefore, we initially are not told who or what promulgated this "policy and practice" and whether or not that promulgation was made "under color of law", a necessary element for recovery under 42 *U.S.C.A.* §1983. See *Adickes v. Kress & Co.*, 398 U.S. 144 at 150, 26 L. Ed. 2d 142 at 150, 90 S. Ct. 1958 (1970); however, what is clear is that neither of the respondents could have been responsible for the complained of "policy and practice" since the positions of Milwaukee city attorney and deputy city attorney and the position of Milwaukee County district attorney were created either by the Milwaukee Common Council pursuant to Sec. 3.03 of the Milwaukee City Charter or by the Legislature of the State of Wisconsin pursuant to Sec. 59.12, Wis. Stats. Therefore, if there was a constitutionally impermissible classification created because of the distinctions between the post of the district attorney or city attorney and the post of the deputy city attorney, those impermissible distinctions would be attributable to the legislative bodies creating the positions and not to the individual serving in them.

Further, it is hard to conceive of any possible relationship between the post of Milwaukee County district attorney and the post of Milwaukee deputy city attorney; and the petitioner has continued to keep this respondent and all of the various levels of the federal judiciary guessing as to what that relationship could be.

Thus, when the petitioner argues at pages 8-9 of his petition that his second cause of action asserts that ". . . the right to engage in active politics and run for

elective office was one *recognized in the community* and a right afforded those in similar employment. . . ." (Emphasis added); he fails to inform this court, and had totally failed to inform the lower courts, as to who or what was responsible for affording that supposed right and as to whether or not that public body or public officer was acting "under color of law" when the right was afforded.

The remainder of the petitioner's argument on this point presents facts totally dehors to the record and, therefore, merits no response.

Thus, as with the respondent's argument in opposition of subpart (A) of this second question, the merits of this final question were addressed solely for the purpose of demonstrating that had the petitioner properly presented his arguments on this cause in the lower courts, those tribunals still would have found it without merit; however, the introductory considerations outlined above clearly establish that, as with subpart (A) of petitioner's second question, this question was not properly presented in the lower courts; and even if it had been, the petitioner has not established, under any of the Rule 19 criteria, that this court should undertake a review of subpart (C) of his second question.

III.

CONCLUSION

For the numerous reasons asserted above, it is respectfully requested that this court deny the instant petition for a writ of certiorari.

Respectfully submitted,

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No. 77-519

In the Supreme Court of the United States

OCTOBER TERM, 1977

JAMES NEWCOMB,

Petitioner,

vs.

JAMES BRENNAN and HENRY REUSS,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT HENRY REUSS IN OPPOSITION

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BRIEF OF RESPONDENT HENRY REUSS IN OPPOSITION

STATEMENT OF THE CASE

This case was presented to the Court of Appeals for the Seventh Circuit on appeal from an order of the United States District Court for the Eastern District of Wisconsin granting the defendants' motions to dismiss the com-

plaint. Given that history, the facts which must be accepted in considering the Petition are the allegations of the petitioner as contained in his complaint.

On April 26, 1976, the petitioner, James Newcomb, the former Deputy City Attorney for the City of Milwaukee, announced his candidacy for the Fifth United States Congressional District seat held by one of the respondents, Congressman Henry Reuss. One week later, on May 3, 1976, the petitioner was discharged by his superior, the other respondent, City Attorney James Brennan. According to the complaint, Brennan had told Newcomb prior to April 26, 1976, the date of Newcomb's announcement of candidacy, that if Newcomb decided to run against Reuss, he could not remain in his employment as Deputy City Attorney.

The complaint alleges in paragraph 1 that the petitioner was employed by the City of Milwaukee as Deputy City Attorney prior to May 3, 1976. It is this employment which was terminated on May 3, 1976. The complaint fails to allege that the petitioner was not in an executive, policymaking position. Likewise, the complaint fails to allege that the petitioner did not engage in policymaking decisions in his employment as Deputy City Attorney.[1]

With respect to Congressman Henry Reuss, the complaint *avers upon information and belief,* in paragraph 6, that Brennan communicated with Reuss prior to April 26,

[1] The petitioner urged in the Court of Appeals that it was error for the trial court to conclude on the basis of studying applicable Wisconsin and City of Milwaukee law that the petitioner was a policymaker. His Petition for a Writ of Certiorari does not assert this issue for review by this Court. It thus can be assumed at this juncture that the petitioner concedes he was in a policymaking position. Cf. *Nunnery* v. *Barber,* 503 F. 2d 1349 (4th Cir. 1974).

1976, about Newcomb's candidacy. Likewise, the complaint alleges *upon information and belief,* in paragraphs 5, 6 and 9, that a conspiracy [2] was formed between Brennan and Reuss and others to discharge the petitioner Newcomb if he did not withdraw his candidacy.

[2] The petitioner in his Petition for a Writ of Certiorari transforms these critical allegations from his speculative beliefs to established facts. They are not true. Although Congressman Reuss recognizes that the Court must accept these assertions, even though presented upon information and belief, in the limited context of considering the Petition, he objects to their being elevated into the status of established facts in the Statement of the Case. Additionally, Congressman Reuss moved to make the complaint more definite and certain in the trial court because the complaint merely alleged that there was a conspiracy without setting forth any details or making any other factual allegations, relying upon *Gaillibeau* v. *City of Richmond,* 417 F. 2d 426, 430 (9th Cir. 1969) and *Weise* v. *Reisher,* 318 F. Supp. 580, 584 (E.D. Wis. 1970), quoting from *Borchlewicz* v. *Partipilo,* 44 F.R.D. 540, 542 (E.D. Wis. 1968). Neither court below was required to resolve this motion due to the granting of the motion to dismiss. However, the flimsy allegations in the complaint demonstrate how easy it is to hale public officials into court without requiring pleadings to contain more than uninformed conclusions.

ARGUMENT

I.

THIS COURT DOES NOT HAVE JURISDICTION TO ENTERTAIN ALL THE QUESTIONS PRESENTED FOR REVIEW BY THE PETITIONER.

This Court specifically held in *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975), that an issue which was not raised before the Court of Appeals would not be considered "for the first time in the Petition for Certiorari." Rule 28(a)(2), Fed. R. App. P., requires an appellant to present "a statement of the issues presented for review." Since the petitioner here is asking the Court to review a decision of the United States Court of Appeals for the Seventh Circuit, the Court should look to see whether the petitioner presented the issues which he claims were erroneously decided by that court or whether the issues which he raises here were fairly encompassed in his Statement of the Issues as presented to the Court of Appeals below. If the petitioner failed to present all issues to the Court of Appeals, then the Court is without jurisdiction to review those issues which are sought to be reviewed here but which were not presented below.

The petitioner in his brief to the United States Court of Appeals for the Seventh Circuit presented the following Statement of the Issues:

> "1. In its ruling on the defendants' Rule 12(b)(6) motions to dismiss, did the District Court err when it considered facts outside the complaint without any notice to the plaintiff that it would do so and without indicating that it would consider the issues as if on a motion for summary judgment?

> "2. In its ruling on the defendants' Rule 12(b)(6) motions to dismiss, did the District Court err when it assumed, without factual basis and without an evidentiary hearing, that plaintiff occupied a 'policy making' position as Deputy City Attorney of Milwaukee, Wisconsin?
>
> "3. Assuming *arguendo* that the District Court properly concluded that plaintiff occupied a policy-making position as Deputy City Attorney, did his complaint, alleging that he had been fired by the City Attorney of Milwaukee, acting in concert with defendant Reuss, solely because he had decided to become a candidate for the office of Fifth District Representative to the United States Congress, state a claim for which relief can be granted?"

Included within the Questions Presented for Review to this Court, as set forth at page 2 of the Petition for Writ of Certiorari, are two issues which were not presented to the Court of Appeals either directly or as subsidiary questions fairly comprised in the Statement of the Issues as presented. Cf. Rule 23,1(c), Rules of Sup. Ct. Those issues not presented below are whether the Court of Appeals erred "(A) in holding that the petitioner served 'at the pleasure' of his employer" and "(C) in failing to address the equal protection cause of action pleaded as a second cause of action in the complaint. . . ."

The petitioner's complaint does not assert that he had a property interest in his job. The United States District Court for the Eastern District of Wisconsin, after carefully analyzing State of Wisconsin and City of Milwaukee law, held that the petitioner served at the pleasure of his employer. See Appendix 12. The petitioner did not challenge that interpretation of Wisconsin law by the

District Court. The petitioner did not assert in his brief to the Court of Appeals that he had a property interest in this job. He should not be allowed to obtain review of that finding for the first time in the United States Supreme Court on a Petition for Writ of Certiorari.

With respect to the equal protection claim, it is clear that that issue was abandoned on appeal to the Court of Appeals. The Statement of Issues presented to the Court of Appeals does not assert the equal protection claim. The brief of the petitioner presented to the Court of Appeals at no place challenges the trial court's denial of the equal protection claim. Therefore, the petitioner should not have been surprised that the Court of Appeals did not address a question which he did not properly present. There is nothing to review from the Court of Appeals on this issue because the petitioner failed properly to ask that court to decide that issue. The petitioner should not be allowed to resurrect an abandoned position in the United States Supreme Court without having first given the Court of Appeals an opportunity to review the question.

II.

THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND IS NOT OF SUFFICIENT IMPORTANCE TO REQUIRE RESOLUTION BY THIS COURT.

The petitioner assumes that because a particular fact situation is one of apparent first impression, it necessarily follows that a resolution by this Court is in order. The considerations which govern the granting of a petition

for a writ of certiorari, as summarized in Rule 19, Rules of Sup. Ct., are whether the decision of the court below is in conflict with applicable decisions of this Court, or whether the question is important enough to require settlement by this Court.

The petitioner now apparently concedes that he was a policymaker. He makes no argument in his petition here questioning that part of the decision of the Court of Appeals which held that as a matter of law he was a policymaker and subject to the rule of *Elrod* v. *Burns*, 427 U.S. 347 (1976). The "unique" question which the petitioner presents is whether an admitted policymaker can be discharged for political reasons other than his failure to join a political party as mandated by his superior. The issue is not significant enough to require the decision of this Court in that it is really nothing more than a restatement of *Elrod*. The decision of the Court of Appeals for the Seventh Circuit does not stray at all from the constitutional principles enunciated therein so as to require further appraisal of that decision in light of these particular facts.

This Court has already held in *CSC* v. *Letter Carriers*, 413 U.S. 548 (1973) and *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1949), that Congress could validly enact legislation prohibiting persons in the federal classified civil service from engaging in political activity on their own time, including running for political office. The penalty under the Hatch Act [5 U.S.C. §7324(a)(2); C.F.R. §733.122(6)] for running for partisan political office can be dismissal. Under the Hatch Act an employee can be fired for engaging in partisan political activities on his own time even though the political activities do not interfere with the ability of

the employee to perform his job. Although First Amendment rights were implicated, in those cases, the Court held that such political prohibitions did not violate the Constitution.

Likewise, in *Elrod* v. *Burns, supra,* the Court held that policymakers could be discharged for political reasons, despite their claims of implicated rights. The particular political reason involved in *Elrod* was the requirement that such employees join particular political parties. The Court held that policymakers could be forced to join a particular political party as a condition to keeping their jobs.

The asserted right involved in this case is the right to run for public office. The decision of the Court of Appeals was that *Elrod* swept broadly enough to authorize superiors to require their subordinate policymakers to refrain from running for political office as a condition to keeping their policymaking jobs. That decision below does not really represent any extension of the *Elrod* decision. There are but minor threats to the smooth and effective operation of an office due to the refusal of a policymaker to join a political party. However, there are outright policy problems which can develop as a result of a policymaker running for political office.

The Deputy City Attorney officially acts in the name of City Attorney Brennan. Even assuming that it is possible for candidate Newcomb to separate his political functions as a candidate and his political functions as a policymaker, the fact remains that during the course of the campaign, there would be a substantial overlapping of roles. In these situations, the policymaker might be tempted to place his electioneering goals above his duty as a policymaker.

Milwaukee City Attorney's office policy decisions made by the Deputy City Attorney exercising the authority of the City Attorney involving zoning problems, City contract negotiations, prosecutions of building code violations, civil litigation, settlement decisions, and the like could be affected consciously or unconsciously upon considerations of personal political campaign support, financial or otherwise. It is certainly within the power of the City Attorney to conclude that his Chief Deputy and policymaker could not run for political office and remain on his job.

As stated by the Court of Appeals:

> "The elected official responsible for setting the policy of the city attorney's office is the city attorney himself. One of the major problems that he confronts in his job is insuring that his policies are carried out by his subordinates, and that any policy-creating decisions made by those subordinates conform with the broad objectives he chooses to pursue. This problem would become a nightmare for the city attorney unless he could demand the absolute loyalty of his policymaking deputy. If he lost confidence in his deputy, for whatever reason, his ability to perform his job would be severely hampered. Moreover, once an open rift developed between the city attorney and his deputy—even if the basis for the feud were unrelated to actual job performance—the city attorney's office could become a battleground in which little was accomplished, to the detriment of the citizens of Milwaukee. It is presumably for this reason that the Milwaukee City Charter and City Code permit the city attorney unfettered discretion to select his deputy and exclude the position of deputy city attorney from the civil service tenure which lesser attorneys in the city attorney's office receive." Appendix, 8-9.

This conclusion by the Court of Appeals below is not contrary to other federal court decisions [3], is in accordance with the *Elrod* decision and does not involve a significant enough question to require further comment by this Court. Simply stated, policymakers can be fired for political reasons.

CONCLUSION

The one issue properly presented to this Court in the petition is not important enough to require settlement by this Court, and the decision below is not in conflict with applicable decisions of this Court. On the basis of the foregoing, therefore, it is respectfully requested that the Court deny the Petition for Writ of Certiorari to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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FRIEBERT & FINERTY

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[3] *Mitchell* v. *King*, 537 F. 2d 385 (10th Cir. 1976); *Correa Velez* v. *De Jesus Schuck*, 396 F. Supp. 1256, 1259 (D.P.R. 1975); *Muir* v. *County Council of Sussex County*, 393 F. Supp. 915 (D. Del. 1975); *Jafree* v. *Scott*, 372 F. Supp. 264 (N.D. Ill. 1974) aff'd in part, rev'd in part, 591 F. 2d 1405 (7th Cir. 1975) (unpublished opinion); *Gould* v. *Walker*, 356 F. Supp. 421 (N.D. Ill. 1973); *Giannaris* v. *Frank*, 387 F. Supp. 570 (N.D. Ill. 1974); *Illinois State Employees Union Council 34* v. *Lewis*, 473 F. 2d 561 (7th Cir. 1972).